No. 06-457

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In The Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC. and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, MISSOURI, NEVADA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A) (2000), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children; and

2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

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INTEREST OF THE AMICI

It is beyond dispute that the states have a strong interest in ensuring that tobacco products purchased over the Internet are not delivered to children. For that reason, at least 40 states prohibit or severely restrict the direct delivery of tobacco products to consumers purchased from Internet vendors. The First Circuit struck down a Maine statute that is designed to curb tobacco sales to children by requiring carriers to comply with modest delivery and labeling restrictions. Unless the Court rejects respondent's limitless view of preemption, the most effective and practical tool that states employ to restrict illegal sales of tobacco to children over the Internet will be undermined, and will allow carriers to be utilized as conduits for illegal tobacco sales.

Internet tobacco sites have increased more than eight-fold in recent years. Unfortunately, a majority of online tobacco retailers have no safeguards or controls to prevent illegal sales to children. Virtually all online sellers simply do not enforce age restrictions. States have been working together on aggressive law enforcement strategies to quell this insidious problem. Several have sued Internet tobacco retailers who flout state laws prohibiting or severely restricting the transport and delivery of tobacco products directly to consumers.

The most effective method to prevent illegal sales to children via the Internet and other non-face-to-face means, however, is to regulate the carriers that transport and deliver the products. Statutes such as Maine's Tobacco Delivery Law thwart minors attempting to purchase cigarettes and other tobacco products over the Internet by requiring carriers to comply with simple delivery and

age-verification requirements when a package is labeled as "tobacco." Most states that restrict online tobacco sales are similar to Maine's law. They typically require that tobacco retailers be licensed by the state and that containers be labeled as containing cigarettes or tobacco products. They usually also impose an obligation to ensure compliance with states' age-verification requirements on the retailer or directly on the carrier.

The carriers' claim that they are significantly burdened by the requirements imposed by Maine's statute does not ring true. They are already implementing a number of the requirements pursuant to an agreement with the State of New York to stop shipping cigarettes to individual consumers in all 50 states. For example, UPS has entered into an Assurance of Discontinuance with New York in which UPS agreed to adopt a formal policy expressly prohibiting the shipment of cigarettes to individual consumers in the United States and accepting shipments of cigarettes only to recipients who are licensed to receive such shipments.[1] (Other carriers have entered into similar agreements.)[2]

Pursuant to its agreement, UPS has amended its Terms and Conditions of Service and its General Tariff Containing the Classifications, Rules and Practices for the Transportation of Property ("the UPS tariff") to include its

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[1] Assurance of Discontinuance between United Parcel Service, Inc. and the Attorney General of the State of New York, October 25, 2005. Assurance found at <http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> (visited August 19, 2007).

[2] FedEx and DHL agreements can be found at: <http://www.oag.state.ny.us/press/2006/feb/FedEx%20-%20Executed%20AOC.pdf> (visited August 19, 2007); and <http://www.oag.state.ny.us/press/2005/jul/dhlaogfinal.pdf> (visited August 19, 2007).

cigarette policy.[3] UPS does not offer a contractual service for the delivery of cigarettes to consumers. Additionally, UPS (1) accepts packages containing tobacco or tobacco products, as those terms are variously defined under applicable state law, only from shippers who are licensed and authorized to ship tobacco and tobacco products pursuant to applicable laws, (2) maintains a database that includes information regarding cigarette retailers, and (3) instructs its drivers, sorters and pre-loaders to actively look for indications that a package contains cigarettes being shipped to an individual consumer, alerting UPS management of such packages and attempting to intercept such packages.[4]

If respondents' expansive view of preemption were to become the law of the land, tobacco laws in Maine and 39 other states would be undercut, and state restrictions on the delivery of myriad other dangerous products that have been traditionally regulated under states' police powers, including explosives, liquor, drugs, poisonous reptiles, and wild animals would be threatened. It makes no sense to say that states can enact laws to ensure that tobacco products are not delivered to children, while taking away the most effective means of enforcing those laws. Reversal of the First Circuit's decision will ensure that states are not precluded from using the most effective tool they have to restrict illegal tobacco sales to children over the Internet.

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[3] Report Regarding UPS's Compliance with the Assurance of Discontinuance, Dec. 20, 2005. Report reproduced in the addendum to the Attorney General's Reply Brief before the First Circuit, at A-21 – A-26.

[4] *Id.* at 4.

SUMMARY OF THE ARGUMENT

The question presented here is not whether the FAAAA's preemption provisions are broadly worded. They are. The question, rather, is whether Congress intended to preempt state laws restricting the delivery of dangerous or age-restricted products – such as tobacco – where a common carrier, such as United Parcel Service (UPS), is used as a conduit for the illegal transactions. It did not.

The FAAAA was enacted in 1994 for the purpose of limiting the economic authority of states over motor carriers and creating a level playing field with air carriers who were not subject to such regulation after enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (ADA). Before the FAAAA, states subjected motor carriers to a great deal of economic regulation such as price controls, tariff filings and the like. Notwithstanding respondent's claim to the contrary, neither the plain language of the statute nor the legislative history indicates in any way that Congress intended to preempt states from enacting legislation, such as Maine's Tobacco Delivery Law, to protect the public health of their citizens, especially children, from the pernicious effects of tobacco use.

Two provisions of Maine's law are at issue here. One requires tobacco *retailers* to use carriers who will comply with Maine's age-verification laws when delivering tobacco products to consumers. The other imputes knowledge to the carrier – that the package contains tobacco products – if the package is marked as containing tobacco or the shipper appears on the Attorney General's unlicenced retailer list – The First Circuit relied on the broad interpretation of ADA preemption in *Morales v. Trans' World*

Airlines, 504 U.S. 374 (1992) in preempting those provisions of Maine's Tobacco Delivery Law. That expansive view was rejected by this Court in favor of a narrower preemption standard in cases decided since *Morales*, including *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997) and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

Unless the Court reaffirms the narrower *Dillingham* and *Travelers'* standard in this case, the laws of 40 states that prohibit or severely restrict the transport and delivery of tobacco products to their citizens will be at risk of preemption. Moreover, if this Court were to accept Respondent's view of preemption, which is even more extensive than *Morales*, the result would be disastrous for the states. In that instance, myriad other state laws that "expressly reference" or merely mention the transportation or delivery of any number of dangerous or contraband products would be at risk, as well.

Respondent claims the provision of the Maine statute imposing on the *retailer* the obligation to ensure that tobacco products are not delivered to children, "expressly references" carrier services even though it does not do so directly. But according to the *Dillingham* standard, the law must act immediately and exclusively on carrier services. Maine's law does neither. Respondent also contends that both provisions of Maine's Tobacco Delivery Law have a "forbidden significant effect" on carrier services by interfering with the uniform delivery practices of the carriers. This claim is also baseless. Respondent never provided evidence that any of Maine's requirements (including age-verification, reading labels on tobacco packages or reviewing a list of unlicenced tobacco retailers)

imposes a significant economic burden on the carriers, as required for preemption under the FAAAA. Under the *Dillingham* and *Travelers'* test for a forbidden connection, any "burdens" imposed by Maine's law are indirect, peripheral and tenuous, and, consequently, are not subject to FAAAA preemption.

In *Dillingham* and *Travelers*, this Court declined to preempt state police power statutes that serve an important state interest and whose impact is too indirect, remote and tenuous to the purpose of ERISA. This Court should confirm that the narrowed preemption test set forth in *Dillingham* and *Travelers* is the appropriate standard under the FAAAA, as well. Maine's Tobacco Delivery Law and similar tobacco laws in other states that serve a critical public health purpose in ensuring that tobacco products are not delivered to children, at most, affect carrier services indirectly and should not be preempted.

ARGUMENT

I. FAAAA'S PREEMPTION PROVISION MUST BE INTERPRETED IN LIGHT OF THE PRESUMPTION AGAINST PREEMPTION OF STATE POLICE POWERS AND THE STRUCTURE AND PURPOSE OF THE FAAAA AS A WHOLE

Where, as here, a federal statute, contains an express preemption provision, the task of the reviewing court is "to identify the domain expressly preempted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (internal quotation marks omitted). As the Court has explained, "[a]lthough . . . analysis of the scope of the

preemption statute must begin with its text, . . . interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption." *Id.* at 484-85. Both presumptions highlight the importance of congressional purpose in determining whether a federal statute preempts state law. First, "[i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the states have traditionally occupied we start [this analysis] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 485-86 (internal citation and quotation marks omitted). Second, "analysis of the scope of the statute's preemption is guided by the oft-repeated comment . . . that the purpose of Congress is the ultimate touchstone in every preemption case. As a result, any understanding of the scope of a preemption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.* at 485-86 (internal citations and quotation marks omitted). Congress's purpose regarding a statute's preemptive scope is discerned "primarily . . . from the language of the preemption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (internal citation and quotation marks omitted).

A. Because Maine's Tobacco Delivery Law Is Crucial to Curb Rampant Illegal Tobacco Sales to Minors, the Presumption Against Preemption Applies with Full Force

The provisions of Maine's Tobacco Delivery Law at issue here require that a person who engages in delivery sales of tobacco products take a number of steps to ensure that those products are not delivered to children. Before shipping, the licensed tobacco retailer must provide the delivery service with the age of the purchaser; it must clearly mark the outside of the package with the retailer's name and state-retailer license number; and it must indicate that the contents are tobacco products. *Id.* § 1555-C(3)(A)-(B). ME. REV. STAT. ANN. tit. 22 (2004). The retailer must also *utilize a delivery service that requires* the purchaser to be the addressee; to be of legal age to purchase tobacco products and sign for the package; and, if under 27 years of age, to produce a valid government-issued photo identification that shows the addressee to be of legal age to purchase tobacco products. *Id.* § 1555-C(3)(C).

Under Maine's statute, a carrier is defined as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers," *Id.* § 1551(1-C). The requirements imposed on the carrier by Maine's statute are: "(a) person may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]," unless the delivery is to a licensed tobacco distributor or retailer. ME. REV. STAT. ANN. tit. 22, § 1555-D (2004). Additionally, "(a) person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of [section

1555-C(3)(B)] or if the person receives the package from a person listed as an unlicenced tobacco retailer by the Attorney General." *Id.*

The presumption against preemption of Maine's Tobacco Delivery Law and similar laws in other states is particularly important in this case. Since at least the beginning of the last century, when this Court decided *Austin v. Tennessee*, 179 U.S. 343 (1900), it has been recognized that States are empowered to ameliorate cigarettes' "deleterious effects, particularly upon young people." *Id.* at 348. The Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). This problem has become substantially more difficult to solve due to the recent boom in sales of tobacco products over the Internet.

Illegal Internet tobacco sales have reached epidemic proportions. The number of Internet cigarette vendors has risen from 88 in January 2000, to 772 in January 2006.[5] Unlike purchasing tobacco products in a brick-and-mortar store, where the seller can look the person in the eye and carefully examine the customer's government identification, there is no evidence that online tobacco sellers utilize any effective method of age-verification. The vast majority of Internet cigarette vendors simply do not prevent youths from purchasing cigarettes online. While 79.7% of vendors include

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[5] Kurt M. Ribisl, Annice E. Kim, Rebecca S. Williams, *Sales and Marketing of Cigarettes on the Internet: Emerging Threats to Tobacco Control and Promising Policy Solutions in Reducing Tobacco Use. Strategies, Barriers, and Consequences.* Washington, D.C.: National Academy Press.

minimum-age warnings on their home pages, only 26.7% feature them at the top of the page where they can be viewed without scrolling, the prevailing standard for Web design.[6] Such warnings are no substitute for valid age-verification procedures, and many of those warnings are likely to be missed by users. Internet cigarette vendors commonly use self-verification methods, asking users to type in a birth date (used by 18.8% of vendors) or stating a disclaimer that, by submitting an order, the customer is certifying that he/she is of legal age to purchase cigarettes (used by 31.5% of vendors). Only a handful of vendors use minimally adequate age-verification methods, such as requiring the submission of a photo ID (used by 7.7% of vendors) or age-verification at delivery (used by 10.1% of vendors).[7] California conducted an investigation that exposed the significant problem with Internet tobacco sales. Children visited 234 web sites and were able to purchase a carton of cigarettes from 129 sites. Only a few Internet retailers did anything more than ask the prospective purchaser to state that he or she was at least 18 years old.[8]

Respondent suggests that Maine could fulfill its public health goal by simply enforcing those portions of its Tobacco Delivery Law that apply only to tobacco retailers. Those provisions include requiring retailers to be licensed and verify age through a database of records or by obtaining a

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[6] Rebecca S. Williams, *Youth Access to Cigarettes Online: Advertised and Actual Sales Practices of Internet Cigarette Vendors* [Dissertation]. Chapel Hill: Health Behavior and Health Education, University of North Carolina School of Public Health (2005).

[7] *Id.*

[8] Jennifer A. Jensen, Norval J. Hickman III, Hope Landrine, & Elizabeth A. Klonoff, *Availability of Tobacco to Youth Via the Internet*, *JAMA*, 291(15), 1837 (2004).

copy of a government ID from the purchaser. Respondent also suggests that Maine, like California, could engage in sting operations to determine if tobacco retailers are complying with those regulations. Br. of Resp't in Opp'n to Pet for Writ of Cert. 16.

These suggestions would be helpful if the target of the stings were brick-and-mortar sellers. In face-to-face sales a tobacco retailer selling to a minor can be quickly identified and the statute can be effectively enforced. However, when the target of the sting is an online tobacco seller, it is extremely difficult to identify the seller, and hence, effectively enforce the statute. Moreover, an Internet sting is, for the most part, only helpful in identifying the *web site* from which the minor purchased the tobacco products and the carrier who delivered them. But simply identifying the online tobacco web sites selling tobacco products to children is insufficient to stop these illegal sales for a number of reasons, including: (1) online tobacco sellers purposely try to hide their identities by, for example, using third party processors to front these transactions; (2) once the online sellers are identified by law enforcement they move to another web site; and (3) many of these sales come from foreign countries or from Indian tribes making it difficult to obtain jurisdiction over these individuals.[9] The only way to effectively ensure that tobacco products are not delivered to children is by verifying in person that the addressee is the purchaser and is not a minor. Age

[9] In 2006, the States of California and Maryland attempted to identify online tobacco retailers illegally peddling tobacco products over the Internet. The states obtained address information from the web sites, and sent hundreds of letters to these retailers. Most were returned as undeliverable.

verification procedures such as those contained in Maine's law are necessary to ensure that carriers will not be used as a conduit for illegal activity.

At least 35 states, including Maine, severely restrict Internet sales to consumers.[10] Although states differ in the restrictions they impose, typically they provide that: (1) Retailers at the time of the sale, and/or carriers upon delivery, must verify that the purchaser is an adult; (2) Retailers must be licensed by the state; and (3) Containers

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[10] ALA. CODE § 13A-12-3.5 (Lexis Nexis Supp. 2006); AK. STAT. § 43.50.105 (2006); ARIZ. REV. STAT. ANN. §§ 42-3222 (2006 & Supp. 2006), 42-3225 (2006); CAL. BUS. & PROF. CODE § 22963 (West Supp. 2007); CAL. REV. & TAX. CODE § 30101.7 (West 2004); DEL. CODE. ANN. tit. 30, §§ 5362, 5365 (Supp. 2006); HAW. REV. STAT. ANN. § 245-16 (2006); ID. CODE §§ 39-5714, 39-5715, 39-5717 (Supp. 2007); 720 ILL. COMP. STAT. ANN. 678/5 (West Supp. 2007); IND. CODE ANN. § 24-3-5-5 (West 2006); IA. CODE ANN. § 453A.45 (West 2006); KAN. STAT. ANN. § 79-3333 (Supp. 2006); LA. REV. STAT. ANN. § 47:874 (2006); ME. REV. STAT. ANN. tit. 22, § 1555 C-D (2004); MASS. GEN. LAWS ANN. ch. 64C, § 6 (West 2001 & Supp. 2007); MICH. COMP. LAWS ANN. § 205.431 (West Supp. 2007); MINN. STAT. ANN. §§ 297F.11 (West 1999), § 325F.781 (West Supp. 2007); MO. ANN. STAT. §§ 149.045 (West 2006), § 407.926 (West Supp. 2007); MISS. CODE ANN. § 97-32-5 (West 1999); MONT. CODE ANN. §§ 16-11-104, 16-11-128, 16-11-131 (2005 & Supp. 2006); NEV. REV. STAT. ANN. §§ 370.325, 370.329 (Lexis Nexis 2007); N.J. STAT. ANN. § 54:40A-32 (West 2002); N.C. GEN. STAT. § 105-113.31 (2003); OKLA. STAT. ANN. tit. 68 §§ 304 (West 2001 & Supp. 2007), 309 (West 2001), 317.4 (West Supp. 2007); OR. REV. STAT. § 323.718 (2005); 72 PA. STAT. ANN. § 231-A (West Supp. 2007); R.I. GEN. LAWS § 44-20.1-5 (2005); S.D. CODIFIED LAWS §§ 10-50-93, 10-50-96 (Supp. 2007); TENN. CODE ANN. § 67-4-1029 (2006); TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2006), TEX. TAX CODE ANN. § 154.207 (Vernon 2002); UT. CODE ANN. § 76-10-105.1 (Supp. 2007); VA. CODE ANN. §§ 18.2-246.10 (2004); WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2007); W. VA. CODE ANN. § 16-9E-4 (Lexis Nexis 2006); WIS. STAT. ANN. § 139.345 (West Supp. 2006); WYO. STAT. ANN. § 39-18-106 (2007).

must be labeled as containing cigarettes or tobacco products.

Five states, Connecticut, New York, Maryland, Ohio and Arkansas, have banned outright the shipment and delivery of cigarettes to individual consumers.[11]

If this Court accepts respondent's expansive interpretation of FAAAA preemption, states' tobacco laws will be undercut. Consequently, states may lose their most effective means of preventing children from purchasing tobacco products over the Internet.

B. Congress Intended the FAAAA to Preempt States' Economic Authority Over Motor Carriers, Not State Police Powers

The FAAAA has two preemption provisions. One of these provisions sets forth the following "general rule":

> Except as provided in subparagraph (B), a State . . . may not enact or enforce a law . . . related to a price, route, or services of an air carrier or carrier affiliated with a direct air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle.

49 U.S.C. § 41713(b)(4)(A).

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[11] CONN. GEN. STAT. ANN. § 12-285c (West Supp. 2007); N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2002); MD. CODE ANN., BUS. REG. §§ 16-222 (2004), 16-223 (2006); OH. REV. CODE ANN. § 2927.023 (Lexis Nexis 2006); ARK. CODE ANN. §§ 26-57-203 (1997 & Supp. 2005), 26-57-215 (1997), 26-57-230 (1997)

The other provision states:

> Except as provided in paragraphs (2) and (3), a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The language was patterned after the preemption provision of the Airline Deregulation Act of 1978 (ADA). *See* H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. Nothing in this language indicates a congressional intent to preempt state police power enactments. To the contrary, the legislative history shows that the FAAAA was intended to preempt states from asserting economic control over carriers in order (1) to eliminate non-uniform "[s]tate economic regulation of motor carrier operations [that] causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets"; and (2) to "level the playing field" between air carriers and motor carriers. H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

That the objectives of FAAAA are consistent with the carriers' goals can be discerned from the testimony of James A. Rogers, Vice President, Government Affairs, United Parcel Service. *State Motor Carrier Laws: Hearing on S. 1491 Before the Subcomm. on Surface Transp. of the H. Comm. on Pub. Works & Transp.*, 103rd Cong. (1994) (statement of James A. Rogers, Vice President, Gov't Affairs United Parcel Service). He testified that he was supporting this legislation because of the decision of the Ninth Circuit Court of Appeals in *Federal Express Corp. v.*

California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991). That case held that the Federal Aviation Act, Pub. L. No. 95-504, 92 Stat. 1705, completely preempted the California Public Utilities Commission from any jurisdiction over the activities of Federal Express. As a result, UPS would have to conform to the economic regulations of the state commissions while its direct competitor would not. Mr. Rogers also listed regulations that created substantial economic burdens for UPS including: (1) by requiring carriers to file rate changes with all 38 state commissions; and (2) by making UPS suffer lengthy and costly delays in order to obtain state approval to change a service offering. *State Motor Carrier Laws: Hearing on S. 1491 Before the Subcomm. on Surface Transp. of the H. Comm. on Pub. Works & Transp.*, 103rd Cong. (1994) (statement of James A. Rogers, Vice President, Gov't Affairs United Parcel Service); 1994 WL 377959. It was these substantial economic burdens that caused the carriers to clamor for enactment of the FAAAA. Never did the carriers suggest at the hearings on the FAAAA that they needed protection from state laws restricting the transportation and delivery of dangerous or contraband products like tobacco.

Moreover, the legislative history shows that the conferees, in their 1994 Report to Congress on the FAAAA, determined that nine states did not have the problematic statutes that the FAAAA was intended to preempt because they did not regulate intrastate prices, routes and services of motor carriers. H.R. Conf. Rep. No. 103-677 at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758. Notably, a number of those pre-1994 statutes had provisions restricting the transportation and delivery of a variety of different products in ways that are very similar to Maine's Tobacco

Delivery Law. Examples of some of those states and their statutes include Arizona (restricting when a common carrier may ship wildlife),[12] Florida (prohibiting a common carrier from knowingly transporting any domestic game unless it is accompanied with the appropriate permit and markings on the package),[13] Maine (requiring common carriers transporting any wild animal or bird to check the hunter's license, affix tags and identification, and make returns to the commissioner),[14] New Jersey (prohibiting common carriers from accepting various beekeeping colonies and supplies without proof of inspection),[15] Vermont (prohibiting common carriers from transporting fish or game protected by law unless accompanied by the required tags),[16] and Wisconsin (prohibiting common carriers from shipping alcohol into the state unless recipient has a proper permit).[17] Under respondent's expansive view of preemption, even these statutes in states that Congress deemed to be in compliance with the FAAAA would be preempted. The conferees implicitly made it clear, using these states as examples, that just because state statutes touch on the transportation and delivery by carriers, or cause carriers to change their uniform practices, does not mean that the statutes are automatically preempted. These statutes pass constitutional muster for the same reason that Maine's tobacco law does – they do not impose the type of significant economic burdens on

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[12] ARIZ. REV. STAT. ANN. § 17-372 (2006).

[13] FLA. STAT. ANN. § 372.16 (West 2006).

[14] ME. REV. STAT. ANN. tit. 12, § 7534 (repealed 2004).

[15] N.J. STAT. ANN. § 4:6-15 (West 1998).

[16] VT. STAT. ANN. tit. 10, § 5102 (2006).

[17] WIS. STAT. ANN. § 125.68 (West 2001 & Supp. 2006).

carrier services that congress intended to prevent when it enacted the FAAAA.

This Court also confirmed Congress's intent not to preempt traditional police-power enactments in a case holding that the FAAAA does not bar a state from delegating to municipalities the state's authority to establish safety regulations governing motor carriers of property. "Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' the preexisting and traditional state police power over safety. . . ." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 439 (2002).

C. If Respondent's View of FAAAA Preemption Were to Become the Law of the Land, State Health and Safety Laws Touching on the Transportation or Delivery of Myriad Dangerous Products Across the Country Would Be at Risk of Preemption

Under respondent's expansive view of FAAAA preemption, every law that mentions the transport and delivery of products by carriers would be preempted. For example, respondent contends that the challenged provisions of Maine's Tobacco Delivery Law are "replete with express references to transportation and delivery services," and are therefore preempted by the FAAAA. According to respondent, these "express references" include the provision in section 1555-D which defines and proscribes the "Illegal Delivery of Tobacco Products" and makes it unlawful for a person to "knowingly transport or cause to be delivered" certain shipments of tobacco products. Resp't's Br. in Opp'n to Writ of Cert. at p. 10. Respondent

erroneously relies on *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (a case interpreting a similarly broadly worded provision in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended 29 U.S.C. § 1001 et seq.) to support its mistaken proposition that the provisions of Maine's law "expressly reference" meaning "mention" carrier services and are preempted. Opp'n to Pet. 10. As discussed *infra*, respondent has misconstrued the Court's decision in that case. *Dillingham* rejected a similarly expansive view of preemption in holding that California's prevailing wage law was not preempted by ERISA. *Dillingham*, 519 U.S. at 334.

Respondent's broad view of FAAAA preemption is especially troubling because its reasoning is not limited to tobacco. Under this theory, any state statute – and there are many – that merely mentions carrier transportation and delivery services would be preempted by the FAAAA. Examples of state statutes mentioning such services range from statutes prohibiting the transportation and delivery of dangerous or contraband products outright such as inedible meat,[18] obscene material,[19] plants infested with listed pests,[20] and explosives,[21] to statutes that regulate or restrict the transportation and delivery of raw oysters or shrimp,[22] swine unless certified as free of disease,[23] and

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[18] N.Y. AGRIC. & MKTS. LAW § 96-z-11 (McKinney 2004).

[19] ARIZ. REV. STAT. ANN. § 13-3502 (2001).

[20] CAL. FOOD & AGRIC. CODE § 6461 (West 2001).

[21] COL. REV. STAT. ANN. § 9-6-102 (West 2003).

[22] ALA. CODE § 9-12-50 (Lexis Nexis 2001).

[23] CONN. GEN. STAT. ANN. § 22-319 (West 2001 & Supp. 2007).

beer and wine.[24] As is clear from the legislative history, Congress would not have intended the FAAAA to preempt every state statute that mentions the transportation and delivery of contraband or dangerous products. Such an expansive interpretation of FAAAA preemption would have an enormously adverse effect on the states' health and safety enforcement efforts. In fact, it has the potential to change the entire landscape of regulation of the transportation and delivery of such products by the states. The same mistaken premises the court applied to preempt Maine's tobacco laws might also be applied to invalidate a whole range of state laws essential to health and safety merely because they touch upon transportation or delivery by motor carriers.

II. THE DECISION BELOW CREATES A SUBSTANTIAL UNCERTAINTY REGARDING STATES' ABILITY TO PROSECUTE VIOLATORS OF LAWS REGULATING THE TRANSPORT AND DELIVERY OF TOBACCO PRODUCTS

This Court should reject the flawed analysis proposed by respondent concerning the provision of Maine's law imputing knowledge to carriers that they were delivering contraband tobacco products from the markings or labels on the package. The First Circuit held that Maine's ban on the *knowing* delivery of contraband tobacco is not preempted by the FAAAA, even though it pertains to carrier services, because the provision only requires that the carriers do not act as knowing accomplices in the illegal sale of tobacco products; it does not require carriers to

[24] VA. CODE ANN. § 4.1-209.1 (Supp. 2007).

modify their delivery methods other than by declining to transport products that Maine legitimately bans. *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 80 (2006). However, respondent contends that the First Circuit's determination that the provision imputing knowledge of illegal activity to the carrier is preempted because that provision would impact the operations of the carrier by requiring reading and comprehending the labels and markings is correct.

If this Court were to decide this case as respondent suggests, such a decision would create uncertainty about the states' Internet tobacco-sales laws, and leaves states in a quandary about which laws will pass constitutional muster and which will not. Such uncertainty puts at risk the states' ability to successfully prosecute sellers of contraband tobacco over the Internet. For example, California has two laws regulating non-face-to-face tobacco sales – California Business & Professions Code § 22963 and California Revenue & Taxation Code § 30101.7. Although section 22963 primarily regulates the conduct of retailers, the statute does provide for an enforcement mechanism against carriers, if they deliver tobacco products with reason to know the package's contents.[25] Section

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[25] Section 22963(d) states:

> For the purposes of enforcement of this section pursuant to Section 22958, the acts of the United States Postal Service or other common carrier when engaged in the business of transporting and delivering packages for others . . . who transports or delivers a package for another person *without any reason to know of the package's contents*, are not unlawful and are not subject to civil penalties. Section 22963, subd. (d); (italics added).

30101.7 requires the retailer to, among other things, label the package as containing cigarettes.

To enforce a ban on the *knowing* delivery of cigarettes, the state must put into evidence the package delivered by the carrier labeled "cigarettes," so that the fact finder can determine if the carrier had reason to know the package contained cigarettes. According to respondent, however, even if the state could impute such knowledge to the carrier this fact could not be introduced into evidence. As a result, the carrier would be immunized from the consequences of its illegal act. It is unthinkable that states can enact laws to protect the public health of their citizens but are deprived of the most effective tools to enforce those statutes.

Respondent's analysis is also flawed as to laws that ban the transport or delivery of contraband products outright. The court held that the knowing delivery of contraband tobacco products is not preempted by the FAAAA, because carriers need not modify their delivery methods other than by declining to transport a product the state has legitimately banned. (*Rowe*, 448 F.3d 66, 80.) As a practical matter, as with the California statute and five statutes banning the direct delivery of cigarettes or tobacco products to consumers, the way to prove a *knowing* delivery of contraband tobacco products by the carrier is also to impute knowledge if the package was labeled "cigarettes" or "tobacco" and by the fact that the cigarettes were delivered to a consumer as opposed to one of the excepted persons – e.g. a state-licensed tobacco distributor or retailer set forth in the statute.

This Court should reject respondent's contention that violation of Maine's statute cannot be imputed to a carrier.

To hold otherwise would effectively leave states that ban outright the delivery of tobacco products no way to enforce their statutes in practical terms. Simply put, under respondent's analysis even statutes banning the *knowing* delivery of contraband tobacco may be unenforceable in application, unless the basis of the knowing violation is that the carrier was specifically told the package contained tobacco products and despite that knowledge, delivered them anyway – an unlikely scenario.

III. RATHER THAN THE BROAD PREEMPTION STANDARD APPLIED BY THE FIRST CIRCUIT IN RELIANCE ON *MORALES*, THE APPROPRIATE STANDARD IS THAT ADOPTED BY THIS COURT IN THE ERISA CASES

This Court should apply a narrow view of preemption in this case as it has done in cases decided since *Morales v. Trans' World Airlines Inc.*, including *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) and *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997). In those cases this Court was grappling with the problem of where to draw the line in a similar seemingly limitless preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA) which preempts state laws "insofar as they . . . relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a) (2000).

In *Travelers*, this Court rejected the opportunity to extend a broad preemption analysis to ERISA. There commercial insurers challenged a New York statute requiring hospitals to collect surcharges from patients covered by

a commercial insurance carrier but not from patients insured by a Blue Cross/Blue Shield Plan, and imposing certain surcharges that vary with the number of Medicaid recipients they enroll. The issue was whether ERISA preempted the state surcharge provisions on bills of patients whose commercial insurance is purchased by employee health care plans governed by ERISA and Health Maintenance Organizations whose membership fees are paid by an ERISA plan. Petitioners claimed that the statute "related to" employee benefit plans within the meaning of ERISA and was preempted. Finding the broad language of ERISA unhelpful in determining whether the state statute was preempted, the Court said:

> . . . one might be excused for wondering at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course . . .

Travelers at 655.

A unanimous Court in *Travelers* read the *Morales* ruling narrowly, and rejected the claim because the surcharges are not imposed exclusively on ERISA plans, but are imposed regardless of whether commercial coverage, or membership is secured by an ERISA plan, private purchase or otherwise. *Id.* at 655. Traditional state regulation having no more than an *indirect effect* on ERISA plans is not "related to" such plans within the meaning of ERISA's preemption clause. *See id.* at 661-62.

In determining whether the surcharge laws have a "connection with" ERISA plans this Court said it was necessary to go beyond the unhelpful text and look instead

to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" *Id.* at 656. Unlike the First Circuit below, this Court "[has] never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption starting with the presumption that Congress does not intend to supplant state law" *Id.* at 654

Although the ERISA preemption provision is broad, "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." *Id.* at 661. This Court found that neither the purpose of the statute nor the effect on ERISA plans justify preemption.

Similarly, in *Dillingham*, this Court held that California's prevailing wage law (CPWL) did not "relate to" employee benefit plans and was not preempted by ERISA. California's law required contractors on public works projects to pay workers the prevailing wage in the worker's locale, except that a lower wage could be paid for workers in apprenticeship programs. *Dillingham* says that since ERISA's enactment, the Court has endeavored with some regularity to interpret and apply the "unhelpful text" of ERISA's pre-emption provision. It has also long acknowledged that ERISA's preemption provision is "clearly expansive," has a "broad scope," and is "conspicuous for its breadth." *Dillingham*, 519 U.S. at 324. The Court's efforts in *Dillingham* at applying the provision has yielded a two-part inquiry: a "law 'relate[s] to' a covered employee benefit plan for purposes of [ERISA] 'if it [1] has a connection with or [2] reference to such a plan.'" (cites omitted) *Id.* "Where a State's law acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA

plans is essential to the law's operation, . . . that 'reference' will result in pre-emption." *Id.* at 325.

The Court in *Dillingham* found that the prevailing wage statute, like the New York surcharge law has a tenuous economic effect on ERISA plans. The Court went on to say that while these laws alter the incentives, they do not dictate the choices facing ERISA plans and "[i]n this regard, it is no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Dillingham*, 519 U.S. at 334.

Similarly, in this case, neither Maine, nor the 34 states restricting Internet tobacco sales to consumers, are forcing carriers to deliver tobacco products. The states are merely granting the power (or creating the incentive) to the carriers to expand their delivery business to include tobacco products, as long as they comply with Maine's statutory requirements. Five states currently ban the direct shipment of tobacco by retailers to consumers, and Maine and the rest of the 34 states that restrict Internet tobacco sales could do so as well. Given that states like Maine that restrict Internet tobacco sales have the greater power to ban the shipments altogether, it makes no sense to say they do not have the lesser power to condition such a shipment on a mode of delivery. Maine's Tobacco Delivery Law is no different from myriad state laws regulating the transportation and delivery of dangerous products which Congress could not possibly have intended to eliminate.

Moreover, neither Maine's Tobacco Delivery Law nor similar laws in other states have a connection with, or reference to carrier services as interpreted by this Court in

Dillingham and *Travelers*. Under the *Dillingham* test, neither section 1555-C(3)(C) nor other similar state statutes imposing age-verification obligations on retailers, "reference" carrier services for two reasons: (1) by their terms these laws apply to delivery services that are not covered by the FAAAA, including the United States Postal Service, so they do not act *exclusively* on carrier services, and (2) the provisions obligate *retailers*, not carriers, so they do not act *immediately* on carrier services. Seventeen states[26] in addition to Maine do not impose age-verification requirements directly on the carrier. Either they impose obligations on the retailer or the statutes apply generally "merely mentioning" carrier services. Under respondent's limitless view, all these statutes "expressly reference" carrier services and should be preempted. But Congress could not have intended such a massive across-the-board preemption of all those state statutes.

Likewise, neither Maine's law nor other states' laws restricting delivery of tobacco and other dangerous products have a forbidden significant effect on carrier services.

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[26] ARIZ. REV. STAT. ANN. §§ 42-3222 (2006 & Supp. 2006), 42-3225 (2006); DEL. CODE ANN. tit. 30, §§ 5362, 5365 (Supp. 2006); IND. CODE ANN. § 24-3-5-5 (West 2006); LA. REV. STAT. ANN. § 47:874 (2006); MINN. STAT. ANN. § 325F.781 (West Supp. 2007); NEV. REV. STAT. ANN. §§ 370.325, 370.329 (Lexis Nexis 2007); OKLA. STAT. ANN. tit. 68 § 317.4 (West Supp. 2007); OR. REV. STAT. § 323.718 (2005); 72 PA. STAT. ANN. § 231-A (West Supp. 2007); R.I. GEN. LAWS § 44-20.1-5 (2005); S.D. CODIFIED LAWS §§ 10-50-93, 10-50-96 (Supp. 2007); TENN. CODE ANN. § 67-4-1029 (2006); TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2006); UT. CODE ANN. § 76-10-105.1 (Supp. 2007); VA. CODE ANN. § 18.2-246.10 (2004); WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2007); W. VA. CODE ANN. § 16-9E-4 (Lexis Nexis 2006).

Twenty-six states, in addition to Maine, require tobacco products to be labeled as such.[27] At least six states, in addition to Maine, require delivery to a licensed entity.[28]

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[27] ALA. CODE § 13A-12-3.5 (Lexis Nexis Supp. 2006).
CONN. GEN. STAT. ANN. § 12-285c (West Supp. 2007).
N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2002).
AK. STAT. § 43.50.105 (2006).
ARIZ. REV. STAT. ANN. §§ 42-3222 (2006 & Supp. 2006), 42-3225 (2006).
CAL. REV. & TAX. CODE § 30101.7 (West 2004).
DEL. CODE. ANN. tit. 30, §§ 5362, 5365 (Supp. 2006).
HAW. REV. STAT. ANN. § 245-16 (2006).
ID. CODE §§ 39-5714, 39-5715, 39-5717 (Supp. 2007).
720 ILL. COMP. STAT. ANN. 678/5 (West Supp. 2007).
IND. CODE ANN. § 24-3-5-5 (West 2006).
KAN. STAT. ANN. § 79-3333 (Supp. 2006).
LA. REV. STAT. ANN. § 47:874 (2006).
MICH. COMP. LAWS ANN. § 205.431 (West Supp. 2007).
MINN. STAT. ANN. § 325F.781 (West Supp. 2007).
NEV. REV. STAT. § 202.24935 (2005).
NEV. REV. STAT. ANN. §§ 370.325, 370.329 (Lexis Nexis 2007).
OKLA. STAT. ANN. tit. 68 § 317.4 (West Supp. 2007).
OR. REV. STAT. § 323.718 (2005).
R.I. GEN. LAWS § 44-20.1-5 (2005).
S.D. CODIFIED LAWS §§ 10-50-93, 10-50-96 (Supp. 2007).
TENN. CODE ANN. § 67-4-1029 (2006).
TEX. HEALTH & SAFETY CODE ANN. § 161.455 (Vernon Supp. 2006).
VA. CODE ANN. § 18.2-246.10 (2004).
WASH. REV. CODE ANN. § 70.155.105 (West Supp. 2007).
W. VA. CODE ANN. § 16-9E-4 (Lexis Nexis 2006).

[28] MD. CODE ANN., BUS. REG. § 16-222 (2004).
N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2002).
HAW. REV. STAT. ANN. § 245-16 (2006).
OH. REV. CODE ANN. § 2927.023 (Lexis Nexis 2006).

(Continued on following page)

Reading labels, reviewing a list of unlicenced tobacco retailers and complying with age-verification requirements has a tenuous effect on carrier services. Clearly such minor inconveniences are not the type of significant economic effect Congress intended when it enacted the FAAAA, and respondent has not introduced any evidence to the contrary. If respondent's limitless view of preemption is accepted by this Court, all of the state statutes are at risk of preemption.

As noted above, UPS and other major carriers are already doing what is basically required by Maine's law and the laws of a number of other states, at least with regard to cigarettes, and since UPS already has a database of tobacco retailers, finding out information about retailers selling other tobacco products should not be too difficult. The objective of Maine's Tobacco Delivery Law, and laws regulating tobacco and other dangerous products in other states, is to ensure that (1) products such as tobacco are not delivered to children and/or (2) the carrier is not the illegal conduit for such activities. Congress's in enacting the FAAAA did not intend to preempt public health laws having an indirect or remote impact on carrier services; nor did Congress intend to create a loophole that would immunize carriers from illegal activity.

In rejecting the narrow approach to preemption taken by this Court in *Dillingham* and *Travelers* in favor of the limitless view of preemption set forth in *Morales*, the First Circuit said that "[I]f developments in pension law have under-cut holdings in air transportation law, it is for the

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AK. STAT. § 43.50.105 (2006).

720 ILL. COMP. STAT. ANN. 678/5 (West Supp. 2007).

Supreme Court itself to make the adjustments." 448 F.3d at 76. The amici states ask this court to do just that – clarify that the narrow standard of preemption set forth in *Dillingham* and *Travelers* is the appropriate test for interpreting the FAAAA preemption provision and that Maine's Tobacco Delivery Law is not preempted by the FAAAA.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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